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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 491

J. C. GULLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX OF BRIEF

	Page
Opinions	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case:	
I. Procedural History of the Case	3
II. Facts	4
Argument	7
Conclusion	17

INDEX TO APPENDIX

Appendix A	Judgment and Commitment of James C. Gulley by United States District Court	19
Appendix B	Opinion and Judgment of Circuit Court of Appeals, Sixth Circuit	21
Appendix C	Denial of Petition for Rehearing by Circuit Court of Appeals	27
Appendix D	Constitutional Provisions & Statutes: 18 U.S.C.A., Sec. 659, page 715. 28 U.S.C., Sec. 1254(1). 14th Amendment to U. S. Constitution	28

CASES CITED

	Page
Albert v. U. S., 281 Fed. Rep. 511	11
Arnold v. U. S., 94 F. 2d 499	10
Brickey v. U. S., 123 F. 2d 341	8
Cartwright v. U. S., 146 F. 2d 133	14
Colt v. U. S., 160 F. 2d 650	8
Craig v. U. S., 81 F. 2d 816	9
Doherty v. U. S., 230 F. 2d 605	8
Hoyt v. People, 30 N.E. 315	11
Husten v. U. S., 95 F. 2d 168 (C.C.A. 8th Cir.)	3, 15
McQuaid v. U. S., 198 F. 2d 987	8, 11
People v. Alward, 188 N.E. 425	11
People v. Braun, 88 Pac. 2d 728	10
People v. Crump, 125 N.E. 2d 615	10
People v. Derrico, 100 N.E. 2d 607	9
People v. Flaherty, 71 N.E. 2d 779	11
People v. Gaskell, 153 N.E. 393	8, 10
People v. Johnson, 145 N.E. 703	11
People v. LaCoco, 94 N.E. 2d 178	8
People v. Matthews, 92 N.E. 2d 147	10
People v. Neimath, 98 N.E. 2d 733	8
People v. Pattin, 125 N.E. 248	11
People v. Reingold, 197 P. 2d 175	11
People v. Rendas, 9 N.E. 2d 237	10
U. S. v. Carengella, 198 F. 2d 3	10
U. S. v. Rainone, 192 F. 2d 860	10
U. S. v. Richards, 194 F. 443	11
U. S. v. Sacia, 2 F. 754	11
U. S. v. Wilson, 284 F. 2d 407	15
U. S. v. Ybanez, 53 F. 536	11
West v. U. S., 113 F. 2d 68	9, 11
18 U.S.C.A., p. 715, Sec. 659	3, 16

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vs.
UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. C. Gulley, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on June 26, 1963, rehearing denied July 24, 1963, affirming a judgment by the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The judgment and commitment of petitioner entered on June 7, 1962 by the United States District Court for the Eastern District of Michigan, Southern Division, appears in Appendix A hereto, *infra*, page 19. No opinion was rendered by said Court.

The judgment and opinion of the United States Court of Appeals, Sixth Circuit, was entered on June 26, 1963 affirming the judgment of the United States District Court, a copy of which judgment and opinion is appended hereto as Appendix B, *infra*, page 21. A Petition for Rehearing was denied by said Court, without opinion, on July 24, 1963, and appears in Appendix C, *infra*, page 27.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on June 26, 1963 (Appendix B, *infra*, page 21). A timely Petition for Rehearing was denied on July 24, 1963 (Appendix C, *infra*, page 27).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) (Appendix D, *infra*, page 28).

QUESTIONS PRESENTED

I. Whether the District Court's failure to instruct the jury

(a) on the question of the credibility of testimony of witnesses,

(b) on the fact that witnesses were accomplices whose testimony should be considered with care and caution, and

(c) that said testimony must be considered by the jury in the light of rewards extended and threats and promises made to said witnesses,

deprived petitioner of his right to trial by jury and violated petitioner's constitutional rights to due process of law as guaranteed him by the 14th Amendment to the U. S. Constitution?

II. Whether petitioner's conviction of having bought, received, and possessed goods from interstate commerce of a value of more than $100.00 can be sustained in the light of the total absence of competent evidence to establish the value of the articles stolen?

III. Whether the failure of the U. S. Court of Appeals to rule on the question of value of the tires allegedly bought, received and possessed by petitioner, thereby affirming petitioner's conviction, was in conflict with the decisions of other Circuit Courts of Appeal pertaining to the question of value of stolen property? (*Husten v. U. S.*, 95 F. 2d 168, (C.C.A. 8th Circuit).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are 18 U.S.C.A., Sec. 659, page 715 and 28 U.S.C., Sec. 1254(1).

The constitutional and statutory provisions are printed in Appendix D, *infra*, page 28.

STATEMENT OF THE CASE

I. Procedural History of the Case

Petitioner was indicted by the United States District Court for the Eastern District of Michigan, Southern Division, on April 5, 1962 for an alleged violation of 18 U.S.C.,

Sec. 659 as amended (Appendix D, *infra*, page 28), and convicted on May 2, 1962.

On June 7, 1962 petitioner was committed by said court to the custody of the attorney general for a period of two years under the provisions of Sec. 4208 (a)(2) T. 18 U.S.C. (Appendix A, *infra*, page 19).

Notice of Appeal from the judgment and sentence of the U.S. District Court was filed on behalf of petitioner on June 12, 1962.

On June 26, 1963 the U. S. Court of Appeals for the Sixth Circuit affirmed the judgment of the U.S. District Court (Appendix B, *infra*, page 21). Rehearing was denied on July 24, 1963 (Appendix C, *infra*, page 27).

II. Facts

Petitioner was charged in the indictment in the U. S. District Court as follows:—

"Count Two

"That on or about November 24, 1961, at Detroit, Michigan, in the Eastern District of Michigan, Southern Division, Robert Emerson Marks, John Bowman and J. C. Gulley did buy and receive and have in their possession certain goods and chattels namely, 49 automobile tires, which had been stolen from an interstate shipment, traveling from the Firestone Rubber Company in Akron, Ohio to the Cadillac Motor Car Company in Detroit, Michigan, and which were in excess of $100 in value, knowing the same to have been stolen; in violation of Section 659, Title 18, U.S.C." (R. 6a).

Ray Coleman was called as a witness for the United States of America. He testified that on November 24,

1961 he, together with Charles Brown and John Johnson went to 21st Street and Jefferson in the City of Detroit (R. 10a), went inside a fence to a trailer from which they took tires and boxes of merchandise (R. 11a). This happened after 8:00 P. M. (R. 12a). They put the goods outside the fence. They then started walking to see if they could find someone to haul the goods for them (R. 13a). They met Charles George, and Coleman told George he had something for him to move, that Coleman needed a car. Coleman offered George $30.00 to move the goods. He told George to park his car and they would bring the goods over to the car (R. 15a). They did not tell George where the goods were (R. 16a). Coleman, Brown and Johnson put the goods in the car and took them to a house on 20th street (R. 16a). They did not have George go with them to where the goods were, because they wanted to keep it between themselves (R. 54a). They did not tell George the goods were stolen (R. 54a). They paid George $10.00 (R. 55a).

The day after Thanksgiving about 10:30 A. M. or 11:00 A. M. Coleman saw Gulley and Brown talking in a green Pontiac automobile (R. 18a). He saw Gulley a second time and talked to Gulley who said he would give him $6.00 a tire, and they settled for $9.00 a tire (R. 30a). Gulley never paid Coleman any money nor did Coleman ever give Gulley any tires (R. 49a).

Coleman was arrested on a Sunday night and taken to Vernor Station. He was questioned by a detective. He was beaten and kicked by the detectives while they were questioning him (R. 33a, R. 34a). A couple days later he made a statement to the FBI. The police asked him who was involved and he told them. He made no mention of J. C. Gulley (R. 39a).

On April 2, 1962 the District Attorney agreed to dismiss the charges against Coleman and permit him to enlist in the Army on condition that he give a signed statement to the prosecution (R. 93a). This Coleman did. He signed the statement but did not read some of it (R. 25a). Some of the statement was untrue (R. 27a). His lawyer sent him over to make the statement (R. 27a). He sat with the FBI agents between four and five hours (R. 28a). The statement was made to Robert Ford and Robert J. Reynolds, FBI agents who asked him questions (R. 22a). If he didn't answer the questions the way they wanted, they didn't write it down (R. 27a). There were two or three parts of the statement that the FBI agent wrote down himself (R. 62a).

On April 25, 1962 Coleman told the District Attorney that he did not want to testify at the trial in this case (R. 59a). At 2:00 P. M. the Assistant District Attorney, Paul Komives, gave him a subpoena. The Assistant District Attorney asked him how he liked the army (R. 69a). He said he like it (R. 69a). The Assistant District Attorney told Coleman if he didn't testify, he would get him out of the army and prosecute him as a juvenile (R. 59a). Coleman testified under pressure (R. 69a).

John Johnson testified that on November 24, 1962, about 11:00 A. M., he and Charles Brown saw J. C. Gulley and agreed to take $6.00 per tire or $300.00 for all the tires. Charles Brown put four tires in the trunk of J. C. Gulley's car (R. 83a). Gulley said he would be back (R. 84a), and came back in ten minutes. Gulley never paid for the tires (R. 49a).

Witness Robert Spencer testified that he is terminal manager for Consolidated Freight Company, that he dis-

covered a considerable amount of a load was missing from a trailer (R. 71a); that they were 49 tires short when they made a delivery to Cadillac Motor (R. 76a); that 33 of the missing tires were delivered to Cadillac Motors (R. 77a). Cadillac Motors claimed the sum of $429.12 for the 16 tires that were not delivered (R. 77a).

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED BECAUSE AN IMPORTANT QUESTION AFFECTING THE RIGHTS OF THE ACCUSED TO TRIAL BY JURY AND DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT IS INVOLVED.

The United States District Court failed to charge the jury on the question of the credibility of the testimony of witnesses, and that the witnesses were accomplices whose testimony should be considered by the jury with care and caution, particularly where testimony was not free and voluntary but given under threat and pressure by the prosecution.

It was the constitutional right of the petitioner to have the jury consider the testimony of said witnesses with full knowledge of the fact that said witnesses were accomplices whose testimony should be closely scrutinized and whose testimony was given under threats, promises and pressure by the prosecution.

This was not bought to the attention of the jury for their consideration and deliberation, and petitioner was thus deprived of his right to trial by jury and due process of law under the 14th Amendment to the United States Constitution.

The witnesses, Coleman and Johnson, were accomplices, and the trial court should have so instructed the jury. Further, the Court should have instructed the jury regarding the weight to be given to the testimony of an accomplice, that an accomplice's testimony should be received with great care and caution, viewed with suspicion and closely scrutinized, and that an accomplice's testimony should be considered differently by the jury than testimony of other witnesses. *McQuaid v. U. S.*, 198 F 2d 987 (C.C.A. Dist. of Col. 1952).

This is particularly true where the testimony of an accomplice is not free and voluntary but given under threat or pressure by the prosecution as in the instant case.

While the weight of authority permits said testimony to be given by an accomplice, the courts in all of the cases cited below caution the jury to receive said testimony with caution, to scrutinize an accomplice's testimony closely and to consider it with care and grave suspicion.

McQuaid v. U. S., 198 F 2d 987;
People v. Gaskell, 153 NE 393;
Doherty v. U. S., 230 F 2d 605;
Colt v. U. S., 160 F 2d 650;
People v. Neimath, 98 NE 733;
Brickey v. U. S., 123 F 2d 341;
People v. LaCoco, 94 NE 2d 178.

In *McQuaid v. U. S., supra*, the trial court instructed the jury that while as a matter of law they could convict upon the testimony of an accomplice, *such testimony, though competent for their consideration, should be received with caution and scrutinized with care.* (Emphasis supplied.) This instruction was upheld on appeal. We call this Court's attention to the language in the case of

People v. Derrico, 100 NE 2d 607, where the court said that in weighing the testimony of an accomplice, *the jury must not judge that testimony as it would that of another type of witness* (emphasis supplied) but must look upon it with great suspicion, must act upon it with great caution, and it must be satisfied from the accomplice's testimony and all the circumstances in evidence of the guilt of the defendant beyond a reasonable doubt.

In *West v. U. S.*, 113 F 2d 68, (C.C.A. Ga. 1940), the court said:

> "In courts of the United States, a conviction may be sustained upon evidence of an accomplice, *but the judge should charge the jury regarding the weight to be given the testimony.*" (Emphasis supplied.)

The Court in the *West* case instructed the jury that testimony of an accomplice should be scrutinized with great care and because of the presumption that that witness is least worthy of belief.

We submit that in the instant case no such instructions were given to the jury by the District Court. The jury was not told that the witnesses were accomplices; nor that the testimony of an accomplice is to be considered differently from that of any other witness; nor, that the fact that a witness is an accomplice affects the credibility of his testimony; nor was he told that the witness Coleman was not just an accomplice, but an accomplice against whom charges had been dropped by the prosecution and therefore even less worthy of belief.

In *Craig v. U. S.*, 81 F 2d 816 (C.C.A. Calif. 1936), the court instructed the jury that the witness was an accomplice and that testimony of an accomplice should be scru-

tinized carefully by the jury and that jury should act on accomplice's testimony with caution and care. This instruction should also have been given in the instant case by the District Court to properly guide the jury in their consideration of the evidence.

See also *Arnold v. U. S.*, 94 F 2d 499, and *People v. Matthews*, 92 NE 2d 147.

It has further been held that promise or expectation of immunity or benefit affects the credibility of an accomplice as a witness and may render his testimony of little weight. To this effect:

U. S. v. Rainone, 192 F 2d 860;
U. S. v. Carengella, 198 F 2d 3;
People v. Gaskell, 153 NE 393.

In *People v. Gaskell*, 153 NE 393, *supra*, the court held that while it is not necessary to reject a witness because he was induced to testify by threats on the part of the prosecution, nevertheless it has been broadly stated that such testimony by an accomplice who has received or expects to receive leniency because of giving such testimony is entitled to little weight. See also *People v. Crump*, 125 N.E. 2d 615.

The case of *People v. Braun*, 88 P 2d 728, said that an accomplice's testimony on behalf of the prosecution after dismissal of serious charges against accomplice, must be viewed in the light of reward extended to him so far as motives arising therefrom might prompt him in giving testimony. *In the instant case, this was not brought to the attention of the jury for their consideration and deliberation* (Emphasis supplied.)

Again in *People v. Rendas*, 9 NE 2d 237, it was held that the testimony of an accomplice is always to be received

with grave suspicion and acted upon with great caution. See also *People v. Flaherty*, 71 NE 2d 779. Further, that in weighing testimony of an accomplice, it is necessary to consider the influence under which it is given and whether the purpose of the witness is to shield himself from punishment, obtain some reward for himself or gratify his malice. Citing *People v. Johnson*, 145 NE 703; *People v. Pattin*, 125 NE 248; *Hoyt v. People*, 30 NE 315; *People v. Atward*, 188 NE 425. The jury was not told this in weighing the testimony in the instant case.

The Judge must charge the jury as to the weight to be given the evidence of an accomplice.

McQuaid v. U. S., 198 F 2d 987;
U. S. v. Sacia, 2 Fed. Rep. 754;
U. S. v. Richards, 194 F 443;
U. S. v. Ybanez, 53 F 536;
Albert v. U. S., 281 F. 511;
West v. U. S., 113 F 2d 68.

Again, the case of *People v. Reingold*, 197 P 2d 175, has held that where the prosecution presented the testimony of an accomplice, notwithstanding the prosecution had dismissed charges against accomplice, testimony of accomplice could be viewed in the light of reward extended to him insofar as motives arising therefrom might prompt him in giving of his testimony. This is also true in the instant case. Coleman's testimony was received although charges against him had been dismissed and the court should have instructed the jury that his testimony could be viewed in the light of the reward extended to him which might prompt him in giving his testimony.

While the District Court instructed the jury that it was the sole judge of the credibility of the facts, the court, nevertheless, failed to tell the jury which facts should be considered by them in weighing the testimony.

The District Court failed to apprise the jury of the fact that charges were dropped against the witness Coleman, whether Coleman was an accomplice or not; and, further, did not tell the jury that witness Coleman was permitted to join the army, although he was a participant in the crime. The jury should have been told by the court to consider these facts as affecting the credibility of the witness Coleman, both as to the statement made to the FBI and as affecting his testimony in this case. This the court failed to do.

Further, the District Court should have told the jury all the facts concerning the witness Johnson, whether Johnson was an accomplice or not; that Johnson had pleaded guilty to the indictment and was awaiting sentence in this court; that there was another charge pending against him at the time he gave testimony herein. All of these facts should have been considered by the jury in weighing Johnson's testimony, and the court should have pointed out to the jury that these facts could be considered by them. This the court failed to do.

The jury had the right to consider Johnson's motive in testifying, whether he was promised or hoped for a reward in regard to his sentence and the other charges pending against him. It is interesting to note that after the present trial, Johnson received probation on his sentence, and the charges against him were dropped by the prosecution.

Petitioner further contends that the April 1962 statement to the FBI was made after inducements and promises were made to Coleman to dismiss charges against him and to permit him to go into the army. The court should have instructed the jury that these facts affect the credibility of the April 1962 statement to the FBI

which the prosecution used to refresh the memory of the witness Coleman, and may render his statement of little weight. The jury had the right to decide how much weight to give this statement, which was not free and voluntary and upon which the prosecution relied in refreshing the witness's recollection. The jury had the right to consider that this statement should be viewed in the light of the reward extended to Coleman, so far as motives arising therefrom might have prompted him in making this statement.

It was the constitutional right of the petitioner to have the jury consider the witnesses' testimony in the light of all the circumstances and the trial court's failure to properly charge the jury as to the credibility of testimony of the witnesses deprived petitioner of his right to trial by jury and violated his right to due process of law as guaranteed him by the 14th Amendment to the U. S. Constitution.

B. PETITIONER'S CONVICTION OF HAVING BOUGHT, RECEIVED AND POSSESSED GOODS FROM INTERSTATE COMMERCE OF A VALUE OF MORE THAN $100.00 CANNOT BE SUSTAINED IN THE LIGHT OF A TOTAL ABSENCE OF COMPETENT EVIDENCE TO ESTABLISH THE VALUE OF THE ARTICLES STOLEN.

The monetary value of the tires allegedly bought, received and possessed by the petitioner was an essential element to be proved by the government beyond a reasonable doubt. There was no evidence that the value of said tires exceeded $100.00.

The only evidence of the values of the goods of the alleged theft was the following testimony:

"Q. (By Paul Komives, Assistant District Attorney): Now by referring to your records there, the Government's Exhibit 6, and other Government exhibit which refers to the shipment, can you tell us what amount of money was claimed or asked for by the consignee with respect to the 16 tires not delivered?

A. (By Robert Spencer, witness for the Government): Yes, sir. We paid a claim for $429.12 to Cadillac Motor.

Q. To cover the 16 tires not delivered—

A. That is correct (R. 77a).

The Court: How much was the claim?

A. $429.12."

Nowhere else during the trial was there any mention of the value of the goods. The petitioner was indicted, convicted and sentence for stealing goods of value of more than $100.00, in violation of Title 18, Sec. 659, USC, which reads in part:

"* * * shall in each case be fined not more than $5,000.00 or imprisoned not more than 10 years or both; but if the amount or value of such money, baggage, goods or chattel does not exceed $100.00 he shall be fined not more than $1,000.00 or imprisoned not more than one year, or both."

The monetary value of the goods was an essential element to be proved beyond a reasonable doubt by the Government. In *Cartwright v. U. S.*, 146 F 2d 133, (1944) 5th Cir., Judge Hudcheson said, at page 135:

"It is therefore well settled that where the grade of the larceny, and consequently, the punishment, depend on the value of the property, it is essential that the value of the property defendant is charged with having taken be alleged and proved." *32 Am. Jur.*, Sec. 112, p. 1023.

"The value of the goods cannot be determined by their appearance alone nor should this court take judicial notice that the goods are worth any particular value."

In *U. S. v. Wilson*, 284 F 2d 497 (1960) 4th Cir., the court met a similar problem. At page 408, Chief Judge Sobeloff had this to say:

"In effect, the statute (Title 18, U.S.C., Sec. 641) creates two separate crimes with different penalties. If the value of the stolen property does not exceed the sum of $100.00 the maximum penalty is a fine of $1,000.00 or imprisonment for not more than one year, or both; but if the value exceeds $100.00 the fine may be as much as $10,000.00 or imprisonment may be as much as 10 years, or both such fine and imprisonment. If a value of more than $100.00 has been proved along with the other elements of the crime, the sentence of 7½ years would have been within the permissible limits. The Government however failed to produce any evidence whatsoever as to the value of the stolen weapons. We are asked to take judicial notice that 72 rifles are worth more than $100.00, but we cannot on the basis of anything in the testimony form a judgment as to the value for the purpose of supporting the greater penalty. Nor in the absence of any proof of value, could the jury be permitted to speculate on this point merely from the appearance of the articles. A fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise. In order to sustain the imposition of the higher penalty, it was as incumbent upon the Government to prove a value in excess of $100.00 as it was to prove the identity of the defendant as the perpetrator of the crime, or the ownership of the property."

The only testimony concerning possession of said tires by petitioner was the statement that four tires were placed in the trunk of petitioner's car by one Charles Brown.

The only testimony as to the value of the tires was that the parties agreed to a value of $9.00 per tire according to witness Coleman, and according to the witness Johnson the parties agreed to accept $6.00 per tire, and that petitioner never paid for any tires.

There was no evidence that the value of said tires exceeded $100.00.

Thus, where the value alleged was not proved, the imposition of a prison sentence in excess of one year, as provided in the statute (18 U.S.C.A. 659), is beyond the legal maximum, and, therefore illegal.

C. THE FAILURE OF THE UNITED STATES COURT OF APPEALS TO RULE ON THE QUESTION OF VALUE OF THE GOODS ALLEGEDLY BOUGHT, RECEIVED AND POSSESSED BY PETITIONER, AMOUNTED TO AFFIRMING PETITIONER'S CONVICTION, AND WAS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE QUESTION OF THE VALUE OF STOLEN PROPERTY.

The decision of the U. S. Court of Appeals in failing to rule on the question of value, thereby affirming the District Court's ruling of conviction of the petitioner, is in conflict with decisions of U. S. Circuit Courts of Appeal in other jurisdictions on this question.

The question of whether the value of stolen property equals or exceeds the jurisdictional amount fixed by statute is discussed in *Husten v. United States*, 95 F. 2d 168, (C.C.A. 8th Circuit). The court said on page 171:

"It is uniformly held that the value of the stolen property is the market value at the time and place of taking if it has a market value. *People v. Gilbert*, 163 Mich. 511; 128 N.W. 756, Ann. Cas. 1912A, 894; *Robinson v. State*, 107 Neb. 591, 186 N.W. 977; *Cunningham v. State*, 90 Tex. Cr. 500, 236 S.W. 89; *17 Ruling Case Law 66*, Sec. 71; *36 Corpus Juris*, 883."

The court further held on page 171, the statute had no relationship whatsoever to the loss of the party from whom the goods were stolen.

In the instant case, there was no proof of the market value of the tires at the time and place of taking. Further, the U. S. District Court failed to charge the jury as to how to determine the value of the tires. This resulted in requiring the jury to speculate as to the value of said tires.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Dated: Detroit, Michigan,
September 20, 1963.

APPENDIX A

JUDGMENT AND COMMITMENT OF JAMES C. GULLEY BY UNITED STATES DISTRICT COURT

(Criminal Docket No. 39314)

(Filed June 11, 1962)

On this 7th day of June, 1962 came the attorney for the government and the defendant appeared in person and

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of receipt and possession of goods stolen from interstate shipment in violation of Section 659, Title 18, U.S.C. as charged in Count Two of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficint cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years and that defendant shall become eligible for parole at such time as the board of parole may determine pursuant to the provisions of Section 4208(a)(2), Title 18, U.S.C.

It is adjudged that the appearance bond of defendant is hereby cancelled.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Ralph M. Freeman,
United States District Judge.

(Signed) John J. Ginther,
Clerk.

(By) /s/ Josephine Williams,
Deputy Clerk.

APPENDIX B

OPINION AND JUDGMENT OF CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

Nos. 15266-67

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 15266
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CHARLES GEORGE, JR.,
Defendant-Appellant.

No. 15267
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
J. C. GULLEY,
Defendant-Appellants.

APPEALS from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided June 26, 1963.

Before: MILLER and WEICK, Circuit Judges, and FOX, District Judge.

MILLER, Circuit Judge. The appellant, Charles George, Jr., and two codefendants, Clyde Caver and John Johnson,

were indicted jointly for carrying away and concealing from a lot in the city of Detroit, with intent to convert to their own use, certain goods which were a part of an interstate shipment of freight, namely, 45 cartons of children's clothing and 49 automobile tires, in violation of Section 659, Title 18, United States Code.

In a separate indictment the appellant, J. C. Gulley, and two codefendants were jointly indicated for buying and having in their possession certain goods and chattels, namely, 49 automobile tires, which had been stolen from an interstate shipment and which were in excess of $100.00 in value, knowing the same to have been stolen, in violation of Section 659, Title 18, United States Code.

The two indictments were consolidated for trial. Johnson entered a plea of guilty and, after testifying in the trial, was sentenced to two years probation.

In the trial the Government introduced the following evidence. On Thanksgiving Day 1961, at about 7:30 P.M., Ray Coleman, Charles Brown, John Johnson and Clyde Caver entered a terminal yard in Detroit, Michigan, through an opening in the fence, broke into a parked trailer and took 49 tires and 45 cartons of children's clothing which were in transit from out of state to destinations in the Detroit area. Coleman and Brown were juveniles. The merchandise was stacked up near the fence. This was completed about 8:30 or 9 P.M., at which time they went to find someone to haul the goods for them. They came upon Charles George, Jr., in his car and entered into an agreement with him to pay him $30.00 to move the merchandise for them. George drove to a place close to where the goods were stacked. The goods were transferred to George's car. George made eight or nine trips transport-

ing the goods to a vacant condemned house not far away. The job was completed about 1:30 A.M.

The next day, in cooperation with George and with the use of George's car, the clothing was sold to Joseph Scott. J. C. Gulley came by the house and after negotiating for the tires agreed to purchase them for $300.00. He came back later in a Cadillac car and picked up four of the tires. Shortly thereafter a truck came by and the remaining tires were loaded into the truck.

The defendants George, Gulley and Caver were found guilty by a jury. George and Gulley received a sentence of two years each, from which they have taken the present appeals. Caver received a sentence of eighteen months, from which no appeal was taken.

Appellant George contends that the District Court erred in denying his motion for acquittal made at the close of the Government's evidence in that the evidence was insufficient to show that George knew that the goods involved were stolen or that George carried the goods away with the intent to convert them to his own use. We do not agree with this contention. We are of the opinion that the Government's evidence, with all the reasonable inferences to be drawn therefrom, was sufficient to take the case against George to the jury. In addition, the record shows that after the District Court overruled the motion for acquittal made at the close of the Government's evidence, George testified in his own behalf, and that the motion for judgment of acquittal was not renewed at the close of all the evidence in the case. It is the usual rule that this constitutes a waiver of the motion for judgment of acquittal made at the close of the Government's case and that the sufficiency of the evidence to take the case to the jury is not open for review on appeal. *Gendron v. United States,*

295 F. (2) 897, 900, C. A. 8th; *United States v. Aman*, 210 F. (2) 344, 345-346, C. A. 7th; *Jasso v. United States*, 290 F. (2) 671, 673, C. A. 5th; *Benchwick v. United States*, 297 F. (2) 330, 335, C. A. 9th. In *Carr v. United States*, 278 F. (2) 702, C. A. 6th, this Court recognized the general rule as above stated, subject, however, to the exception that plain errors affecting substantial rights may be noticed, although they are not brought to the attention of the Court. We do not think the facts of the present case warrant our departure from the general rule.

The appellants also contend that Johnson and Coleman, who testified for the Government, were accomplices of the appellants and that the District Judge erred in not instructing the jury that the testimony of an accomplice should be received with great care and caution and viewed with suspicion and closely scrutinized. The District Judge instructed the jury fully and carefully with respect to the credibility of a witness, including the duty to take into consideration the interest of the witness, if any, in the result or the outcome of the case, the motives of the witness in testifying and "everything in connection with the witness which in the light of human experience, will aid you in determining the proper weight and value to be given to his testimony." He particularly referred to the fact that the Assistant United States Attorney threatened to have the Government witness Coleman removed from the army to prosecute him under the Federal Juvenile Delinquency Act for his participation in the incident involved in these indictments if he should refuse to testify for the Government on this trial. He told the jury that these tactics on the part of the Government were highly improper and should not have occurred, and that the jury should take these facts into consideration in weighing the testimony of the witness Coleman in deciding the credibility to

be given this witness. No exceptions were taken by the appellants to these instructions and no instructions were offered by them with respect to what they now claim the District Judge should have charged. In both the opening and closing statements of Government counsel to the jury it was stated that certain Government witnesses were accomplices and that their testimony was to be received with caution. In the opening statement to the jury of counsel for the appellants it was stated, "Ladies and gentlemen, in regard to the District Attorney's suggestion that you bear close watch to the testimony of the witnesses, I can only say amen."

Although it is the better practice for the trial judge to specifically charge the jury that the testimony of an accomplice should be received with ear and caution and closely scrutinized, we are of the opinion that it was not prejudicial error in the present case for the District Judge, in instructing generally as he did with respect to the credibility of witnesses, to omit a specific reference to the testimony of an accomplice when he was not requested to do so. No exception was taken to his charge and the fact that certain witnesses for the Government were accomplices, whose testimony should be closely scrutinized, was adequately brought to the attention of the jury by counsel for both the Government and the defendants. *Rule 30, Federal Rules of Criminal Procedure; United States v. Finazzo*, 288 F. (2) 175, 177, C. A. 6th, *Pittsburgh Plate Glass Co. v. United States*, 260 F. (2) 397, 402, C. A. 4th, affirmed, 360 U. S. 395, rehearing denied, 361 U. S. 855, *Audett v. United States*, 265 F. (2) 837, 847, C. A. 9th, cert. denied, 361 U. S. 815, rehearing denied, 361 U. S. 926, *Young v. United States*, 297 F. (2) 593, 594, C. A. 9th; *Continental Baking Co. v. United States*, 281 F. (2)

137, 155, C. A. 6th; *Caminetti v. United States*, 242 U. S. 470, 495. In our opinion, this is not a case justifying the application of Rule 52(b), Rules of Criminal Procedure. *Pagliochini v. United States*, 264 F. (2) 583, C. A. D. C.; *Sims v. United States*, 254 F. (2) 654, C. A. 9th; *Sartain v. United States*, 303 F. (2) 859, 861-862, C. A. 9th; *Conley v. United States*, 257 F. (2) 141, 143, C. A. 6th.

The judgments are affirmed.

APPENDIX C

DENIAL OF PETITION FOR REHEARING BY CIRCUIT COURT OF APPEALS

No. 15,267

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
J. C. GULLEY,
Defendant-Appellant.

Before: MILLER and WEICK, Circuit Judges, and FOX, District Judge.

Appellant's petition for rehearing having been considered by the Court,

It is ordered that said petition be denied.

Approved for entry.

Shackelford Miller, Jr.,
United States Circuit Judge.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the Constitution of the United States provides:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

18 U.S.C.A., Sec. 659, page 715:

Sec. 659. Interstate or foreign baggage, express or freight; state prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house or platform or depot or from any steamboat, vessel or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods and chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzeled or stolen; or

Whoever embezzeles, steals, or unlawfully takes, carries away or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzeled or stolen; or

Whoever embezzeles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods or chattels, or whoever buys, receives or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzeled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount of value of such money, baggage, goods or chattels does not exceed $100 he shall be fined not more than $1,000 or imprisoned more than one year, or both.

The offense shall be deemed to have been committed, not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of said money, baggage, goods or chattels.

The carrying or transporting of any such money, freight, express baggage, goods or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping documents of such shipment shall be *prima facie* evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c.645, 62 Stat. 729, amended May 24, 1949, c.139, Sec. 13, 63 Stat. 91.

28 U.S.C., Sec. 1254(1):

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. * * *"

INDEX

Opinion below
Jurisdiction
Questions presented
Statute involved
Statement
Argument
Conclusion

CITATIONS

Cases:

Caminetti v. *United States*, 242 U.S. 470
Gordon v. *United States*, 161 F. 2d 855, certiorari denied, 333 U.S. 862
Holmgren v. *United States*, 217 U.S. 509
Mims v. *United States*, 254 F. 2d 654
Pagliochini v. *United States*, 264 F. 2d 583
United States v. *Crawford*, 195 F. 2d 472
United States v. *Finazzo*, 288 F. 2d 175, certiorari denied, 368 U.S. 837
United States v. *Marpes*, 198 F. 2d 486, certiorari denied, 344 U.S. 876
Young v. *United States*, 297 F. 2d. 593, certiorari denied, 369 U.S. 891

Statute:

18 U.S.C. 659

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 491

J. C. GULLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-26) is reported at 319 F. 2d 77.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1963. A petition for rehearing was denied on July 24, 1963 (Pet. App. 27). By an order of August 13, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to

and including September 23, 1963. The petition was filed on September 21, 1963.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to give an explicit instruction that the testimony of accomplice witnesses should be received with caution albeit no such instruction was requested and no objection was made to the charge as given.

2. Whether the evidence was sufficient to establish that the value of goods possessed by petitioner after they had been stolen from an interstate shipment exceeded $100.

STATUTE INVOLVED

18 U.S.C. 659 provides in part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> * * * *

---

[1] Although the petition was filed within the extended time limit, the certified record which must accompany the petition (Revised Rules 21(1)) was not filed until September 25, 1963, two days late.

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing 49 automobile tires valued at more than $100, knowing them to have been stolen from an interstate shipment, in violation of 18 U.S.C. 659 (R. 3a, 6a).[1] Petitioner was sentenced to imprisonment for two years, to be eligible for parole at such time as the board of parole may determine (R. 102-103a). On appeal the conviction was affirmed (Pet. App. 21-26).

1. The principal government witnesses were Coleman, a juvenile, and Johnson, a defendant who had pleaded guilty (R. 4a-5a, 4b, 44b). The evidence showed that on the evening of November 23, 1961, Johnson, Coleman, and one or two others removed 49

---

[1] Petitioner was tried together with four other defendants. Two were co-defendants in the possession charge, and the other two had been named in a separate indictment charging theft of property, including that which petitioner later possessed, from an interstate shipment. The indictments were consolidated for trial. Petitioner's co-defendants in the possession charge were acquitted, and the defendants charged with the theft were convicted (R. 1a-3a). The convictions of these defendants are not involved in the present petition.

tires and 45 cartons of children's clothing from a trailer parked in a terminal in the city of Detroit. The goods were in transit from out-of-state destinations to the Detroit area (R. 10a-13a, 73a, 28b-32b). Using the car of another defendant, the thieves moved the stolen merchandise to a vacant house (R. 16a, 50a, 19b, 23b-27b, 34b-36b). On the morning of November 24, 1961, petitioner came to the house to negotiate for purchase of the tires. The price asked and offered varied between $6 and $9 per tire. Petitioner finally agreed to purchase the lot of 49 tires for $300 (R. 16a-19a, 30a, 48a, 81a-82a, 9b, 54b, 57b, 60b). Four of the tires were then loaded into the trunk of his car, and petitioner drove away (R. 83a). About ten minutes later he returned in a different automobile and waited until a truck arrived (R. 84a) into which the other tires were loaded (R. 78a-79a, 42b). The police came on the scene as the loading was being completed (R. 42b-43b).

The terminal manager for Consolidated Freight Company identified the manifest listing shipments on the trailer from Akron, Ohio, to Detroit, Michigan (R. 73a). On the morning of November 24, 49 tires were missing from the shipment. Of these, 33 were recovered, leaving a total shortage of 16 tires for which the freight company paid $429.12 to Cadillac Motor Company, the consignee (R. 76a-77a).

Coleman, one of the government witnesses, identified a signed written statement he had given to the Federal Bureau of Investigation on April 2, 1962, one week before he went into the army (R. 21a-22a, 38a). He testified that the statement was not entirely ac-

curate (R. 25a-26a, 45a-46a, 51a). He further testified that on April 25, 1962, the opening date of the trial, he informed the Assistant United States Attorney that he was unwilling to testify. He was then told that if he did not testify the Assistant United States Attorney would have him removed from the army and tried as a juvenile (R. 59a, 60a, 63a). He also testified that government counsel told him to tell only the truth, and that he had given the truth in his testimony (R. 61a), but that because of his attorney's absence he did not know whether the threat to remove him from the army could be carried out, and his trial testimony was therefore given "under pressure" (R. 68a).

Johnson testified that he had pleaded guilty in the instant case and was awaiting sentence. He also testified that he was awaiting trial in a second federal case (R. 44b-45b).

2. Petitioner made no objection to the trial court's instructions to the jury (R. 125b), nor is there any indication that he requested an instruction concerning the credibility of an accomplice. The district judge did not instruct the jury specifically with respect to accomplice testimony, but he did tell the jury that in determining the credibility of a witness it might consider "the interest of the witness, if any, in the results or the outcome of the case" and "the motives of the witness in testifying" (R. 122b). With regard to the threat made to Coleman, the court instructed as follows (R. 122b-123b):

The evidence in this case shows, among other things, that the Assistant United States Attorney threatened to have the Government witness Ray Coleman removed from the army to prosecute him under the Federal Juvenile Delinquency Act for his participation in the incident involved in these indictments if he should refuse to testify for the Government on this trial.

I charge you that these tactics on the part of the Government were highly improper, and should not have occurred, and is one of the facts and circumstances you may take into consideration in weighing the testimony of the witness Coleman, and in deciding the credibility to be given to the witness Coleman. * * *

ARGUMENT

1. Although petitioner's counsel made no request for a specific instruction that Coleman and Johnson were accomplices whose testimony should be received with extreme care and caution and did not object to the court's failure so to instruct, petitioner now contends that the omission of the charge constituted reversible error. As the court of appeals observed, however, the district judge did instruct the jury fully with respect to the credibility of witnesses, telling it to take into consideration the motives of the witnesses in testifying, and calling particular attention to the impropriety of threats by government counsel as a factor to be weighed. The judge was under no duty to review specifically every fact bearing on credibility which the defense had brought out on cross-examination of the witnesses. Although it

may be better practice to caution juries as to the credibility of accomplice witnesses, failure to give such an instruction does not constitute reversible error, *Holmgren* v. *United States*, 217 U.S. 509, 523-524; *Caminetti* v. *United States*, 242 U.S. 470, 495, particularly if no request is made for such a charge, *Young* v. *United States*, 297 F. 2d 593, 594 (C.A. 9), certiorari denied, 369 U.S. 891; *Mims* v. *United States*, 254 F. 2d 654 (C.A. 9); *United States* v. *Finazzo*, 288 F. 2d 175, 176 (C.A. 6), certiorari denied, 368 U.S. 837; *Pagliochini* v. *United States*, 264 F. 2d 583 (C.A.D.C.).

Moreover, the substance of such an instruction was brought to the attention of the jury by the government attorney who, in his closing argument, referred to the testimony of the government's witnesses as that of "accomplices" and told the jury that this evidence was "to be weighed carefully" (R. 101b, 111b).

2. Contrary to petitioner's contention, there was substantial evidence that the stolen tires had a value of more than $100. The value of the tires was proved by the testimony of the terminal manager that for the unrecovered 16 tires, the freight company paid $429.12 to the consignee (R. 73a, 76a-77a). Cf. *United States* v. *Marpes*, 198 F. 2d 186, 189 (C.A. 3), certiorari denied, 344 U.S. 876; *United States* v. *Crawford*, 195 F. 2d 472, 474-475 (C.A. 3); *Gordon* v. *United States*, 164 F. 2d 855, 858-859 (C.A. 6), certiorari denied, 333 U.S. 862. Furthermore, the evidence established that in negotiations for sale of the 49 tires the asking price varied between $6 and

$9 per tire, and that petitioner himself valued them at no less than $300. Hence there was more than adequate evidence upon which the jury could find that the stolen tires "were of the value of more than $100," which the court charged to be one of the essential elements of the offense (R. 119b).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

NOVEMBER 1963

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IN THE

Supreme Court of the United States

JANUARY TERM, 1964

No. 491

J. C. GULLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A REHEARING

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE SIXTH CIRCUIT

PETITION FOR A REHEARING

J. C. Gulley respectfully petitions this Court for a rehearing herein upon substantial grounds. Said grounds were not presented heretofore because no occasion for urging them appeared until the brief for the United States in opposition to petitioner's petition for a Writ of Certiorari was filed by the Solicitor General.

ARGUMENT

Petitioner respectfully asserts that the Solicitor General's reliance upon *United States v. Marpes*, 198 F.2d 186, 189, certiorari denied 344 U.S. 876, and *United States v. Crawford*, 195 F.2d 472, 474-475, and *Gordon v. United States*, 164 F.2d 855, 858-859 in support of his argument that there was substantial evidence that the stolen tires in the possession of the petitioner had a value of more than $100.00 was clearly erroneous and misleading inasmuch as the cases cited and relied upon by the Solicitor General failed to substantiate his conclusions.

The cases relied upon by the Solicitor General are readily distinguishable from the case at bar.

In the case of *Gordon v. United States, supra*, in addition to testimony that the insured was paid $4600.00 which was $1500.00 less than the loss claimed by the insured, there was expert testimony that the value of the stolen jewelry to the ultimate consumer was approximately $15,000.00.

In the case of *United States v. Marpes, supra*, the shipping documents showed a shipment of 400 cartons weighing 9043 pounds, half of which was stolen. The carrier placed a "released value" of 50c per pound on the merchandise which meant that the carrier's liability was $4500.00. Freight charges alone were in excess of $100.00.

In the case of *United States v. Crawford, supra*, an invoice was produced showing the price of the rifles to be $55.85 each. There was testimony that one, Cumberland, who stole the rifles sold eleven of them to the defendant who actually carried the rifles away from Crawford's home.

None of these cases cited by the Solicitor General are analogous to the present case where the sole testimony concerning value was the fact that an insurance claim for the loss of 16 tires was paid. There was no invoice showing the value of the tires. There was no expert testimony or any testimony as to the value of each of the tires. None of the tires were offered into evidence so that the jury itself could determine the value of the tires.

In no Circuit Court of Appeals in any District in the United States has the payment of an insurance claim been held sufficient evidence of value upon which to base a conviction. Nor has the value placed upon stolen goods by a defendant himself been sufficient proof of value to sustain a conviction.

Furthermore the evidence in this case showed possession by the petitioner of only *four* tires which witnesses claimed they placed in petitioner's automobile. There was no evidence whatsoever to substantiate possession of more than said four tires and no testimony was offered as to the value of said four tires.

CONCLUSION

Petitioner's conviction of having bought, received and possessed goods from interstate commerce of a value of more than $100.00 cannot be sustained in the light of a total absence of competent evidence to establish the value of the articles stolen.

The cases relied upon by the Solicitor General are distinguishable from the instant case and failed to substantiate the Solicitor General's conclusion that value had been proved in the instant case. This Petition for Rehearing should be considered inasmuch as the brief of the Solicitor

General to which petitioner has heretofore had no opportunity to reply, might be misleading in its reliance upon cases which fail to substantiate his conclusions. A rehearing of the original petition for a Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

SAMUEL POSNER,
Attorney for Petitioner.
712 Penobsbcot Building,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
December 31, 1963.

CERTIFICATE OF COUNSEL

I, Samuel Posner, attorney for the petitioner named in the foregoing Petition for Rehearing, do certify that said petition is presented in good faith and not for delay and that petition is restricted to the grounds above specified.

SAMUEL POSNER,
Attorney for Petitioner.

Dated: Detroit, Michigan,
December 31, 1963.